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Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMEN CENTER FOR CHOICE, INC.,
EPOC CLINIC, INC., and CENTRAL FLORIDA
WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court injunction placing a thirty-six-foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred-foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

3. Whether a state court injunction prohibiting named demonstrators and those acting "in concert" from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the Petitioners listed in the caption, Operation Rescue, Patrick Mahoney, Randall Terry, Bruce Cadle, Operation Rescue America, and Operation Goliath were listed as parties in the Supreme Court of Florida, but did not present oral argument. None of the Petitioners are active corporations.

The Respondents are all incorporated in Florida and do not have parent or subsidiary companies.

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IN THE

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Petitioners,

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WOMEN'S HEALTH CENTER, INC., AWARE WOMEN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

Judy Madsen, Ed Martin and Shirley Hobbs respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is not yet reported, but is reproduced as Appendix A. *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993).

The opinion of the Eighteenth Judicial Circuit of Florida granting the Amended Permanent Injunction challenged herein was not reported, but is reproduced as Appendix B. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-K (Fla. Cir. Ct. Oct. 25, 1993).

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Florida was entered on October 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION AND INJUNCTION AT ISSUE

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. Const. amend. I.

This case presents constitutional challenges to the Eighteenth Judicial Circuit of Florida's Amended Permanent Injunction

reproduced as Appendix B.[1]

STATEMENT OF THE CASE

A. The Decision of the Supreme Court of Florida

This case challenges the constitutionality of an Amended Permanent Injunction (hereinafter "Injunction") (App. B) entered on April 8, 1993 by the Honorable Robert B. McGregor, Circuit Judge in the Eighteenth Judicial Circuit of Florida, against the Petitioners, and those acting "in concert" with the Petitioners.

The Respondents in this case are all abortion businesses located in Central Florida. The Petitioners named in the challenged Injunction are opposed to abortion. Certain individuals demonstrated outside the Respondents' clinics and expressed their opposition to abortion. Petitioners Madsen, Martin and Hobbs were not associated with those protesters blocking the clinics or with Operation Rescue. Respondents requested injunctive relief enjoining the Petitioners and others from trespassing, blocking or obstructing ingress into or egress from the Respondents' abortion facilities.

On October 21, 1991, Women's Health Center, Inc., Aware Woman Center For Choice, Inc.,[2] EPOC Clinic, Inc., and Central Florida Women's Health Organization, Inc. (hereinafter "Respondents") filed a Verified Petition for Injunction in the

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[1] On April 15, 1993, the Florida circuit court entered a Modification of the Amended Permanent Injunction. The only provisions modified from the Amended Permanent Injunction entered April 8, 1993 concern the procedures for enforcement of the Amended Permanent Injunction by law enforcement personnel.

[2] The challenged Injunction only applies to the Aware Woman Center for Choice, Inc. located at the corner of U.S. Hwy. 1 and Dixie Way in Melbourne, Florida.

Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida seeking a permanent injunction against Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen and Shirley Hobbs (Judy Madsen, Ed Martin and Shirley Hobbs are hereinafter "Petitioners").

On October 25, 1991, the Respondents filed a Verified Motion for Temporary Restraining Order (hereinafter "TRO"). The court entered an Order granting the TRO on October 25, 1991. On December 6, 1991, the Petitioners filed a Motion to Dissolve the TRO. The Respondents then filed a Motion for Permanent Injunction on December 31, 1991. The Petitioners filed an Answer to the Verified Petition for Injunction on January 15, 1992. In their Answer, the Petitioners raised as an affirmative defense the Petitioners' rights of free speech and assembly under the United States Constitution. On January 27, 1992, the court denied the Petitioners' Motion to Dissolve the TRO.

On July 13, 1992, the court entered an Order requiring the parties to submit a stipulation of issues and facts and memorandum of law within thirty days. The court indicated that it would base its ruling upon the factual stipulation, affidavits filed by the parties, and the memoranda of law. On September 30, 1992, the court entered an Order granting a Permanent Injunction against the Petitioners. The Order stated:

> A. [Petitioners], OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs,[3] are hereby enjoined from:
>
> 1) trespassing on, sitting in, blocking, impeding or

[3] The Permanent Injunction entered on September 30, 1993 did not address those acting "in concert" and was therefore limited to those named in that injunction.

> which abortions are performed in Brevard and Seminole County, Florida; and,
>
> 2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,
>
> 3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.
>
> B. Nothing in the Court's Order should be construed to limit [Petitioners'] exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate 1), 2), and 3) above;
>
> C. This Court retains jurisdiction for determination of any costs to be imposed upon [Petitioners].[4]

On March 22, 1993, the Respondents moved for a modification of the Permanent Injunction. From March 31, 1993 through April 2, 1993 the court conducted an evidentiary trial on the Respondents' Motion for Sanctions and Modification of the Permanent Injunction recited above. The Aware Woman Center For Choice, Inc. (hereinafter "Clinic") was the only facility in question at the evidentiary hearing. On April 8, 1993, following the evidentiary proceedings, Judge McGregor entered the Amended Permanent Injunction (App. B) which is the subject of this Petition for Writ of Certiorari.

The undersigned counsel filing this Petition for Writ of Certiorari filed the first Notice of Appeal challenging the Amended

[4] The Permanent Injunction entered September 30, 1993 is not challenged.

Permanent Injunction. On April 27, 1993, the Fifth District Court of Appeal of Florida entered an Order granting the Petitioners' Motion to Expedite the Appeal filed by the undersigned counsel. Subsequent to the action of the undersigned counsel, a second group of petitioners filed their own separate appeal. On June 4, 1993, a motion to consolidate the separate appeals was filed with the Fifth District Court of Appeal.

The Petitioners' briefs argued that the Injunction was content-based, created a complete ban on pro-life speech in a traditional public forum, and created vague and overbroad restrictions on freedom of speech and association in violation of the Petitioners' First Amendment rights. On June 9, 1993, the Supreme Court of Florida accepted certification of the case from the Fifth District Court of Appeal as a matter of great public importance. On August 31, 1993, the undersigned counsel presented oral argument, and on October 28, 1993, the Florida Supreme Court issued its opinion, eight days after the Eleventh Circuit Court of Appeal's decision in *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820).

The Supreme Court of Florida, in *Operation Rescue v. Women's Health Center, Inc.*, No. 81,905 (Fla. Oct. 28, 1993) (App. A), concluded that the challenged Injunction was content neutral and therefore not subject to strict scrutiny as required in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed 2d 794 (1983). Although the court agreed that the Injunction encompassed a traditional public forum--public sidewalks, public streets, and public right-of-ways--the court concluded that the Injunction was content neutral and allowed time, place, and manner restrictions on free speech. The court maintained that the Injunction regulated not what the Petitioners might speak, but when, where, and how the Petitioners were to speak.

The court concluded that the Injunction only banned the Petitioners from entering the thirty-six-foot and three-hundred-foot

buffer zones. The court noted that the Injunction could have been narrowed, but declined to quibble over a few feet or over purely symbolic matters.

The court also discounted any challenge that the Injunction did not leave open ample alternative means of communication. Noting that speech was permitted outside the buffer zones and other public areas surrounding the Clinic, the court concluded that the Petitioners' message could be conveyed outside the buffer zones. In addition, because the court concluded that the Injunction was content neutral, it further determined that prior restraint challenges would not apply.

Finally, the court rejected any challenge based on vagueness or overbreadth. The court stated that "sounds or images observable to or within earshot of the patients inside the Clinic" was sufficiently specific to give proper notice of what would be considered illegal under the Injunction. As to overbreadth, the court stated that the phrase "in active concert or participation" would create no danger that the Injunction would be unfairly enforced.

In its summary, the court recognized without comment the case of *Cheffer*, wherein the United States Court of Appeals for the Eleventh Circuit ruled that the same Injunction violated free speech.[5]

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[5] The Appellees in *Cheffer* filed a Suggestion of Rehearing *En Banc* on November 9, 1993 on which the Eleventh Circuit has not ruled. Petitioners' Madsen, Martin and Hobbs desired to await the Eleventh Circuit's decision on the Appellees' motion for rehearing before submitting this Petition for Writ of Certiorari. However, on November 24, 1993, a petition was filed in this Court by other parties in the Florida court. In order to avoid prejudice to the Respondents and allow them an opportunity to respond fully to any petitions before this Court, Petitioners' Madsen, Martin and Hobbs file this petition.

B. The Decision of the United States Eleventh Circuit Court of Appeals

At the same time the Injunction was being challenged on the state level, a federal challenge was concurrently prosecuted in the case of *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820).[6] On April 13, 1993, Ms. Myrna Cheffer, represented by the same undersigned counsel for the Petitioners herein, filed a Complaint for Injunctive and Declaratory Relief, a Motion for a Temporary Restraining Order, and Motion for a Preliminary Injunction in the United States District Court for the Middle District of Florida challenging specific provisions of the Injunction. Cheffer also requested declaratory judgement to determine the constitutionality of certain provisions of the Injunction and whether the challenged provisions violated Cheffer's free speech and freedom of religion rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. Although Ms. Cheffer was not a party in the state court Injunction, she feared arrest because the Injunction had been applied to anyone expressing a pro-life view through the phrase "in concert."[7]

On April 14, 1993, the District Court denied Cheffer's Motion for Temporary Restraining Order and Motion for

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[6] A similar strategy was taken in the case of *Macheskey v. Bizzell*, 414 F.2d 283 (5th Cir. 1969), wherein several state court defendants filed for injunctive relief in federal court against a state court injunction. In *Macheskey*, the state's injunction created a total ban on all picketing within a three-hundred-foot buffer zone around several businesses. In both *Cheffer* and *Macheskey*, the federal court provided protection against a state court's injunctive order which was overbroad and prohibited peaceful picketing within a traditional public forum.

[7] On April 12, 1993, Judge McGregor, addressing about fifty people who were arrested on April 10, 1993, two days after the Injunction was entered, stated that the Injunction applied to anyone with a pro-life belief.

Preliminary Injunction, holding that Cheffer failed to show that the balance of equities favored Cheffer in compelling the court to enjoin enforcement of the state court Injunction. On April 16, 1993, Cheffer filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. The undersigned counsel presented oral argument before the Eleventh Circuit on June 30, 1993.

On October 20, 1993, the Eleventh Circuit entered an Order vacating the District Court's Order denying Cheffer's Motion for Temporary Restraining Order and Cheffer's Motion for Preliminary Injunction and remanded the case to the District Court for a new decision in light of Cheffer's First Amendment rights.

In *Cheffer*, the Eleventh Circuit held that the Injunction was a viewpoint-based restriction on free speech in a traditional public forum. The court stated:

> The order enjoins Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf.... Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican party, the state Republican party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf."

1993 WL 416820 at 6 (App. C-11-12).

The court noted that a viewpoint-specific restriction in a traditional public forum is unconstitutional unless it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end. In this instance, the court concluded that the Injunction did not meet either test. In sum, the court concluded: "The practical effect of this section of the Injunction was to assure

that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." *Id.* (App. C-12).

The court noted that women were not prevented from obtaining abortions at the Clinic. The *Cheffer* court reasoned that the two rights which collided in this case were between an actual prohibition of speech and a potential hinderance of abortion rights. The court stated that should the lower federal court issue an Order barring enforcement of the Injunction, "it would promote only speech and expressive conduct, not assault, trespass, or destruction of property." 1993 WL 416820 at 6 (App. C-13).

Finally, the court declined to entertain an argument that the speech in this case was disruptive, discourteous, or offensive. Noting this Court's tradition of protecting First Amendment rights, *Cheffer* reaffirmed that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id.* (App. C-14). To punctuate the point, the court affirmed that "[w]e protect much that offends in the name of free speech--we cannot refuse such protection to those who find abortion morally reprehensible." *Id.* (App. C-14).

REASONS FOR GRANTING THE WRIT

This case presents stark conflicts between the Supreme Court of Florida, the Eleventh Circuit, and the decisions of this Court and numerous other federal and state courts. On the same identical issue within the same jurisidiction comes two conflicting opinions. The City of Melbourne, Florida, is confused as to which ruling to follow.[8] The scope and importance of the ruling in this case is enormous, reaching far beyond the state of Florida, and will create a precedent which allows other states to impose broad restrictions

[8] *See* Appendices D and E.

on the peaceful expression of speech within a traditional public forum. Presently, several courts are attempting to resolve the questions presented in this Petition for Writ of Certiorari.[9] The Florida court summarily dismissed the reasoning of the Eleventh Circuit Court of Appeals' unanimous decision interpreting the identical language within the identical Injunction. The Florida court also refused to follow this Court's precedent and allowed an Injunction to stand which prohibits the peaceful expression of speech. A writ of certiorari should be issued to resolve these conflicts and provide direction for the people and courts of our nation.

I.

THE FLORIDA SUPREME COURT'S OPINION, THAT THE INJUNCTION IS NOT CONTENT-BASED AND DOES NOT VIOLATE FIRST AMENDMENT FREE SPEECH RIGHTS, IS IN DIRECT CONFLICT WITH THE OPINION OF THE ELEVENTH CIRCUIT COURT WHICH FOUND THE IDENTICAL INJUNCTION WAS CONTENT-BASED AND DID VIOLATE THE FIRST AMENDMENT.

The Florida Supreme Court's opinion is in direct conflict with

[9] *E.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 12 Cal. App. 4th 1817, 16 Cal. Rptr. 2d 540, *review granted*, 851 P.2d 774, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Murray v. Lawson*, 264 N.J. Super. 17, 624 A.2d 3 (App. Div. 1993), *cert. granted*, 627 A.2d 1149 (N.J. 1993); *Boffard v. Barnes*, 264 N.J. Super. 11, 624 A.2d 1 (App. Div. 1993), *cert. granted*, 627 A.2d 1150 (N.J. 1993); *Horizon Health Center v. Felicissimo*, 263 N.J. Super. 200, 622 A.2d 891 (App. Div. 1993), *cert. granted*, No. 36,728 (N.J. 1993); *Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National*, No. 93-CV-4266 (Colo. Dist. Ct. 1993), *appeal filed*, No. 93-CA-1613 (Colo. Ct. App. 1993); *Woman's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. 1993), *appeal filed*, No. C9-93-1776 (Min. Ct. App. 1993).

the Eleventh Circuit Court of Appeals' decision in *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993) (1993 WL 416820). Although both courts interpreted the same language within the same Injunction, the two courts came to diametrically opposite decisions. As stated by this Court in *Charles Dowd Box Co. v. Courtney*, 82 S.Ct. 519, 526 (1962), "'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States . . . . To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." Moreover, this Court stated in *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991), that a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts . . . ." *See also Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local 298, A. F. of L., et al. v. County of Door*, 79 S.Ct. 844 (1959); *State of California v. Taylor*, 77 S.Ct. 1037 (1957).

Initially, both courts recognized the Injunction affected a traditional public forum. Both courts agreed that if the Injunction was content-based it must satisfy the strict scrutiny standard. The two courts conflicted in that the federal decision utilized the higher standard of strict scrutiny while the Florida court applied a lesser standard under the content neutral analysis.

In both the state and federal cases, the same Injunction was applied to persons who neither violated the original September 30, 1992 Injunction, nor in any way attempted to block access to any clinic or act in an unlawful manner. Petitioners Madsen, Martin and Hobbs never participated in any disruptive activities or violated any laws. Likewise, Ms. Cheffer has never engaged in disruptive or illegal behavior.

Both the state and federal cases were brought by the same undersigned counsel. In both courts, the same evidence was presented and the same arguments were presented challenging the same language in the same Injunction. In *Cheffer*, the federal

court recognized that the content-based language in the Injunction proscribed protected free speech activities in a traditional public forum. The court noted that:

> Judge McGregor's Amended Permanent Injunction, by operating on persons not before this court, serves as a statute of local effect regulating picketing by antiabortion speakers. As a viewpoint-based restriction operating in a traditional public forum (the public streets and sidewalks around the Clinic), it is subject to a most stringent review.

1993 WL 416820 at 5 (App. C-10).

The *Cheffer* court noted that a viewpoint-specific restriction in a traditional public forum is unconstitutional unless it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end. In this instance, the court concluded that the Injunction did not meet either test. The court concluded: "The practical effect of [the "in concert"] section of the injunction was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." *Id.* at 6 (App. C-12).

In direct conflict with the Florida Supreme court's opinion, the *Cheffer* court held that the Injunction was only applied to those with a pro-life view. "This is apparently precisely what occurred. Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the Injunction) that they were designated for arrest by Clinic workers and police officers because they were perceived to be 'pro-life'." *Id.* at 6 n.11 (App. C-12). The court found that

> Judge McGregor accepted this interpretation of the intent of the injunction and explained (to the arrestees): "[T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in

> respect to the Clinic, adverse to the Clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection."

Id. (App. C-12).

In contrast, the Florida court held that the Injunction was content neutral and simply created time, place and manner restrictions in a traditional public forum. Relying in part on the Ninth Circuit's opinion in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988), the Florida court stated: "The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity." Slip op. at 16. However, the *Cheffer* court specifically rejected such reasoning. In reviewing the Ninth Circuit's opinion in *Portland*, the *Cheffer* court noted that:

> The [Ninth Circuit] argued the preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press, nor even to the general issues raised at their demonstrations. . . . Therefore, we apply to the preliminary injunction the rules regarding the constitutionality of 'time, place, and manner' regulations of speech.

1993 WL 416820 at 6 n.10 (App. C-11).

Rejecting *Portland*, the *Cheffer* court concluded: "We do not find this reasoning at all persuasive." *Id.* (App. C-11).

The Florida Supreme court's opinion is in direct opposition to the Eleventh Circuit Court of Appeals' decision ruling on the same identical language in the challenged Injunction. This conflict

has created confusion as to which ruling is controlling. The City of Melbourne has refused to enforce the Injunction.[10] A writ of certiorari should be issued to resolve this conflict.

II.

THE FLORIDA SUPREME COURT'S OPINION IS IN DIRECT CONFLICT WITH THE JUDGMENT OF THE UNITED STATES SUPREME COURT, AND SEVERAL FEDERAL CIRCUIT AND STATE COURTS.

A. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgment Of The United States Supreme Court.

The Florida court's primary flaw is that it failed to distinguish the Petitioners' peaceful acts from other organizations and persons. Following from the example in the lower Florida court, the Florida Supreme court declined to separate the Petitioners' peaceful protest from those other persons alleged to have committed unlawful acts. For this reason, the Florida court's opinion is in direct conflict with this Court's judgment in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).[11]

The Florida Supreme Court's opinion was that the Injunction merely restrained speech when joined with unlawful conduct. On

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[10] *See* Appendices D and E. The Florida Supreme Court directs enforcement officials to apply the Injunction; the Eleventh Circuit demands they must not.

[11] The Florida Supreme court refused to recognized the Petitioners' arguments based on *Claiborne Hardware*, 458 U.S. 886 (1982). The Florida court considered *Claiborne Hardware* only as it related to the issue of damages. The Florida court expressly rejected any First Amendment arguments based on this Court's decision in *Claiborne Hardware*.

the face of the Injunction it is clear that lawful conduct and protected speech are also prohibited. The Injunction proscribes peaceful demonstrations and speech "or other sounds or images observable to or within earshot of the patients inside the Clinic." Thus, if a pro-life demonstrator can be seen or heard inside the Clinic, regardless of where the demonstrator is located or what type of activity and speech is taking place, the pro-life person is subject to immediate arrest without notice. In *Claiborne Hardware*, this Court held that in the context of protected speech or activities, the courts may "restrain **only unlawful conduct** and the **persons responsible for conduct** of that character." 458 U.S. at 924 n.67 (emphasis supplied).[12]

The facts in *Claiborne Hardware* are quite similar to the case before this Court. In March 1966, several hundred black persons implemented a boycott of white merchants following racial abuses in Claiborne County, Mississippi. The business merchants sued for injunctive relief against the demonstrators and Charles Evers, a leader of the movement, who "sought to persuade others to join

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[12] Historically, numerous federal and state courts have noted the distinction between prohibited illegal conduct and lawful speech protected under the First Amendment. *E.g.*, *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curium) (affirming refusal to enjoin free speech surrounding abortion clinic that tended to "intimidate, harass, or disturb patients" in light of serious threat to First Amendment protections), *vacated on other grounds sub nom. Bray v. Alexandria Woman's Health Clinic*, 113 S.Ct. 753 (1993); *Mississippi Woman's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (affirming lower court's denial of injunction enjoining pro-life demonstrations outside abortion clinics); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990) (upholding injunction but limiting effect to prohibit only illegal activity, but not protected First Amendment activity); *O.B.G.Y.N. Ass'n. v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) (reversing injunction in part which restricted lawful free speech expression).

the boycott through pressure and the 'threat' of social ostracism." *Id.* at 909-10. Mr. Evers and other active members of the boycott furthered their cause by seeking to "embarrass" non-participants and "coerce them into action" and conformity. *Id.* at 910.

Additionally, the lower Mississippi court found that some defendants, acting for all others, became involved in "acts of physical force and violence" against potential customers and used "[i]ntimidation, threats, social ostracism, vilification, and traduction" to achieve their desired results. *Id.* at 894. "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; . . . and a group of young blacks apparently pulled down the overalls of an elderly brick mason known as 'Preacher White' and spanked him for not observing the boycott." *Id.* at 904-05.

Momentum was added to the boycott following the assassination of Dr. Martin Luther King, Jr. on April 4, 1968 and "[t]ension in the community neared a breaking point" on April 18, 1969 after the shooting of a local black man. *Id.* at 901-02. Nevertheless, coinciding with the escalation in activities was the continuous "uniformly peaceful and orderly" picketing of the white-owned businesses which often involved small children and occurred "primarily on weekends." *Id.* at 903.

The Mississippi Supreme Court upheld the permanent injunction entered below which

> permanently enjoined [the demonstrators] from stationing 'store watchers' at the [merchants'] business premises; from 'persuading' any person to withhold his patronage from [the merchants]; from 'using demeaning and obscene language to or about any person' . . . ; [and] from 'picketing or patrolling' the premises of any of the [merchants]. . . .

Id. at 893.

The Supreme Court of Mississippi approved the injunction on the theory that the "petitioners had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895. The court reasoned that "[i]f any of these factors--force, violence, or threats--is present, then the entire boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other." *Id.* at 895.

This Court reversed the Supreme Court of Mississippi and dissolved the injunction reasoning that every element of the boycott was "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907. This Court emphasized that "precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916. This Court declared that the injunction "must be dissolved" or "modified to restrain **only unlawful conduct** and the **persons responsible** for conduct of that character." *Id.* at 924 n.67 (emphasis supplied).

The Supreme Court of Florida's decision is in direct conflict with this Court's judgment in *Claiborne Hardware* because the Injunction broadly prohibits all demonstrating within the designated buffer zones, including peaceful picketing and speech. The Florida court declined to recognize that the Injunction proscribes both lawful and unlawful speech or activity by the language prohibiting the peaceful display of "images observable to" persons inside the Clinic.[13] In application, the Injunction eviscerates the Petitioners' First Amendment right to peacefully picket. As stated in

[13] Applying this language, the clinic personnel become the enforcers of the Injunction with the use of a simple photograph. When a person standing within the clinic takes the picture of a pro-life person standing outside the clinic, the pro-life person outside the clinic is in violation of the Injunction. In this circumstance, the Injunction reaches beyond the thirty-six-foot buffer zone and out into the far reaches of the camera's lens and indiscriminately prosecutes without regard to the activity's peaceful nature.

Claiborne Hardware, some individuals did more than assemble peacefully, but "[o]ther elements of the [demonstration] . . . also involved activities ordinarily safeguarded by the First Amendment." *Id.* at 909.

Although the Florida court attempts to associate the Petitioners with numerous unlawful acts and actors,[14] the Respondents' stipulation clearly reveals their agreement that Petitioners Judy Madsen, Ed Martin and Shirley Hobbs have never blocked access to the Clinic. The Florida court ignores this crucial fact and repeatedly claims that "Operation Rescue" (apparently referring to one or another of the named organizations or some unknown individual) committed some unlawful or onerous act.[15]

The Florida Supreme court's decision is also in conflict with the principles of free speech and association established by this Court. "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control Coalition for Fair Housing v. Berkley*, 454 U.S. 290, 294 (1981). In emphasizing the importance of free association to guarantee the right to be heard, Justice Harlan wrote:

[14] The Florida courts repeatedly characterized Operation Rescue as a radical, violent gang roaming the counties seeking opportunities to inflict harm and incite fear in others. Even if this were true, it is improper to affiliate Petitioners Madsen, Martin and Hobbs with this activity when the Respondents admit these Petitioners never violated any laws or blocked any clinic.

[15] In light of the Florida court's continued assertion that the Injunction addresses only those acting "in concert," this Court should perceive that the Injunction is indeed content-based and therefore unconstitutional because it does not satisfy a strict scrutiny standard.

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

As did the Supreme Court of Mississippi in *Claiborne Hardware*, the Supreme Court of Florida claims the Injunction is required to protect various state interests which were jeopardized by activity at the Clinic. However, as this Court stated in *Claiborne Hardware*, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Id.* at 908. This Court stated that a "'blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), this Court unanimously held that "peaceful assembly for lawful discussion cannot be made a crime." *Id.* at 365. The Florida Supreme court concluded that the Injunction was necessary because the "[Petitioners] never sought to obey the [September 30, 1992] injunction" and continued in unlawful activity such as attempting to block ingress and egress to the Clinic;[16] pushing literature into the windows of passing cars;[17] picketing residences of Clinic

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[16] The Florida circuit court based this conclusion on the assertion that unnamed and unknown persons, who were acting "in concert" with the named Petitioners, violated the September 30, 1992 injunction.

[17] The Melbourne Police Chief admitted the least drastic means to restrict this activity is enforcement of the Florida traffic regulations related to literature distribution into moving vehicles.

personnel;[18] and inciting fear through threat and intimidation while quoting the statement, "I pray that God strikes you dead now!"[19]

However, the Respondents clearly stipulated that Judy Madsen, Ed Martin and Shirley Hobbs never physically blocked access to any abortion clinic. Moreover, the September 30, 1992 Injunction did not even address distribution of literature into moving vehicles or residential picketing. The Florida court continually confused and misconstrued the association of the Petitioners with other organizations.[20] From this

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[18] In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court carved out for the unwilling listener a residential privacy exception allowing some limitation on First Amendment free speech. However, this Court acknowledged the constitutionality of residential picketing. The Florida court's reliance on *Northeast Woman's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991), is in error because the Injunction sub judice prohibits "approaching . . . the residence . . . of any 'owners or agents' of the clinic." Because the names and addresses of clinic personnel are not available, this creates a restriction on a pro-life person's ability to walk through any and all residential neighborhoods without fear of violating the Injunction.

[19] In *Watts v. United States*, 394 U.S. 705 (1969), the petitioner was convicted of willfully making a threat to take the life of the President. He stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. This Court reversed the conviction and agreed that "the statement, taken in context, was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708.

[20] The Florida courts mistakenly associated the "Petitioners" as working "in concert" with Operation Rescue, Operation Rescue National, IMPACT, Rescue America, Operation Rescue America National, and Operation Goliath. Although the Florida courts concluded that the Petitioners before this Court were associated with "Operation Rescue," and frequently cite to that organization, no evidence was ever presented

misinterpretation, the Florida court launched into accusations of events performed by unnamed and unknown individuals and attributed all such occurrences to the Petitioners before this Court. In actuality, the Respondents agreed in the lower Florida court that there was considerable difficulty in determining the actors and their relation to one another or any other association.

The Florida Supreme court's true error is that it imputed the conduct of individuals acting alone to the Petitioners. Rather than examine the lower Florida court's record and separate those known to have acted unlawfully from the Petitioners and their peaceful speech, the Florida Supreme court's opinion routinely designates anyone performing an act which is perceived as associated with pro-life belief as "acting in concert" with other organizations.

The Florida court's sentiment that the Injunction only proscribes the activities of those "acting in concert" with the Petitioners begs for the conclusion that the Injunction is content-based. In fact, Judge McGregor, in applying the Injunction, stated that when he issued the Injunction he intended it to **only prohibit pro-life speech**.

The Florida court simply confused the Petitioners before this Court with other unnamed and unknown individuals. Rather than make an attempt to determine who actually violated the law, the Florida court amassed all persons with a pro-life belief into one organization regardless of whether that person had ever committed any unlawful act. Because the Injunction prohibits pro-life expression, such as singing, chanting, images observable or sounds within earshot, it is clearly content-based. Prohibition of unlawful activities is objective, but a complete ban prohibiting expression causes the Petitioners to be lumped together with alleged unlawful acts of others. This Court has clearly stated that "[f]or liability to be imposed by reason of association alone, it is necessary to

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linking the Petitioners to that group in any way.

establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920.

The Injunction clearly prohibits the association and free expression of pro-life, but not pro-choice, demonstrators. As stated by the Eleventh Circuit in *Cheffer*: "The practical effect of [the "in concert"] section of the injunction was to assure that while 'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not." 1993 WL 416820 at 6 (App. C-12). The Injunction is content-based and imputes the unlawful acts of other unnamed and unknown individuals to the "Petitioners" and all others acting "in concert." As this Court stated in *Noto v. United States*, 367 U.S. 290 (1961), intent to act unlawfully

> must be judged 'according to the strictest law,' for 'otherwise there is danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. 290, 299-300 (1961).

Such a content-based Injunction is clearly unconstitutional because it creates unlawful class distinctions[21] and then prevents that class from exercising its right to associate or peacefully express its political views. As stated by this Court in *Citizens Against Rent Control*: "There are, of course, some activities, legal if engaged by one, yet illegal if performed in concert with others,

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[21] The specific classification is directed at those individuals who hold to a pro-life view. The Injunction specifically prohibits sidewalk counseling, singing, and would also prohibit prayer.

but political expression is not one of them." 454 U.S. at 296. "[T]he Court has consistently disapproved governmental sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185-86 (1972).

The Florida court's decision also conflicts with this Court's precedent regarding prior restraints on free speech. The Florida court held that the doctrine of prior restraints does not apply unless an injunction addresses content-based restrictions on speech. The Florida court's holding is in direct conflict with the precedent set by this Court.

In *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), this Court held that an injunction which prohibited the distribution of "leaflets or literature of any kind, and from picketing" was an unconstitutional prior restraint. "Any prior restraint on expression" carries with it a "'heavy presumption' against its constitutional validity." *Id.* at 419. This Court's decision in *Keefe* was reaffirmed in the recent case of *Alexander v. United States*, 113 S.Ct. 2766 (1993). In *Alexander*, this Court reasoned that "permanent injunctions are classic examples of prior restraints." *Id.* at 2771. The Florida Court refused to follow this Court's teaching in *Keefe* and *Alexander* and allowed an Injunction banning pro-life speech within a traditional public forum to stand. By requiring consent before speech is allowed within the three-hundred-foot buffer zones, the Injunction creates a prior restraint on peaceful free speech. Rather than recognize the Injunction as a classic example of a prior restraint, the Florida Supreme Court held the Injunction was content neutral and refused to apply the doctrine of prior restraint.

The Florida Supreme Court expressly declined to separate the Petitioners' peaceful protest from those other persons alleged to have committed unlawful acts. Therefore, the Florida court's opinion is in direct conflict with this Court's judgment in *Claiborne Hardware* and numerous other decisions of this Court

protecting free speech and association. For this reason, a writ of certiorari should be issued to resolve this conflict.

B. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgments Of The Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals.

The Florida Supreme Court's decision is in direct conflict with the Fourth Circuit Court of Appeals' opinion in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), which held that an injunction prohibiting blockading or obstructing ingress or egress of abortion clinics could not be broadened in scope to prohibit intimidation, harassment, or disturbance of clinics' patients or potential patients. The Fourth Circuit Court of Appeals held that such an overbroad scope "would risk enjoining activities clearly protected by the First Amendment." *Id.* at 586. The court further noted that the pro-life demonstrators also sought to "persuade women not to seek the services of abortion clinics and to 'impress upon members of society' the moral rightness and intensity of their opposition to abortion." *Id.* The Fourth Circuit affirmed the district court's decision to limit the injunction in a manner that would not interfere with protected First Amendment activity.

In contrast, the Florida Supreme court upheld the challenged Injunction partly based on its reasoning that broader restraint was necessary to protect the Clinic's patients from harassment and intimidation. As stated by the Fourth Circuit, such a broad scope within an injunctive order clearly violates the First Amendment. The Respondents repeatedly stipulated that the Petitioners never blocked access or obstructed ingress or egress of the Clinic. Rather, the Petitioners sought to persuade women not to seek the services of the Clinic due to the Petitioners' belief that abortion is morally improper. As stated by the Fourth Circuit, persons are clearly protected under the First Amendment when expressing speech which attempts to persuade others and seeks to "impress upon members of society" the moral rightness and intensity of

opposition to abortion. *Id.* at 586. The Florida Supreme court's decision is in conflict with the Fourth Circuit's opinion because it approves an overbroad Injunction which prohibits peaceful speech which attempts to persuade others.

The Florida Supreme Court's decision is in direct conflict with the Fifth Circuit Court of Appeals' opinion in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). In *McMillan*, the Fifth Circuit denied an abortion clinic's request for an injunction which would prohibit pro-life speech within a five-hundred-foot buffer zone around the clinic. The clinic had requested that the court impose time, place, and manner restrictions upon the pro-life demonstrators. The court refused to grant the injunction, noting that women were not denied the right to receive an abortion at the clinic. The Fifth Circuit agreed with the district court's decision that "granting the injunction would be substantially more likely to infringe on First Amendment rights than denying the injunction would be to result in a denial of privacy rights." *Id.* at 795. The Fifth Circuit concluded that the clinic was truly arguing

> that potential patients are being denied a supposed right not to hear speech that they do not wish to hear. Such a right, in a public forum, would be a most unusual one. To argue any other theory of the case--such as that women are being denied the substantive right to an abortion because of the 'atmosphere created,' (despite the fact that women are receiving abortions and that no one is being restrained)--would be to eviscerate the First Amendment.

McMillan, 866 F.2d at 794.

The *McMillan* decision mirrors the reasoning in *Cheffer*. As in *McMillan*, the *Cheffer* court noted that "there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice. The clash here

is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights." 1993 WL 416820 at 6 (App. C-13). The *Cheffer* court stated that should the lower federal court issue an Order barring enforcement of the Injunction, "it would promote only speech and expressive conduct, not assault, trespass, or destruction of property." *Id.* (App. C-13).

The *McMillan* decision reaffirmed the importance of protected, peaceful First Amendment speech in a traditional public forum. In conclusion, the Fifth Circuit held that "in a polity where the people are sovereign, informed choice enhances responsible decision-making. Neither we nor the clinic can cut off the peaceful communication of information, distasteful to some so it be." *Id.* at 795. The Florida Supreme court seriously erred in upholding an Injunction which fails to recognize the right of peaceful First Amendment speech. The Florida court's decision is in direct conflict with the Fifth Circuit Court of Appeals.

The Florida Supreme Court's decision is in direct conflict with the Eighth Circuit's opinion in *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422 (8th Cir. 1988). In *IBP*, several unions brought a declaratory action to have provisions of a state mass picketing statute declared unconstitutional. The Eighth Circuit Court of Appeals held that the statute which prohibited more than two picketers within fifty feet of an entrance to the named premises was overbroad and violated the demonstrators' First Amendment rights. In light of the statute's overbroad application to protected First Amendment activities, the Eighth Circuit held the statute unconstitutional. In contrast with *IBP*, the Florida Supreme court's decision allows an Injunction to stand which on its face and in application prohibits protected First Amendment activity. Therefore, because the challenged Injunction creates a ban on all pro-life speech within the buffer zone surrounding the Clinic, the Injunction unconstitutionally violates the Petitioners' First Amendment right to peaceful protest in a traditional public form.

The Florida Supreme Court's decision is in direct conflict with the Tenth Circuit Court of Appeals' opinion in *Cannon v. City and County of Denver*, 998 F.2d 867 (10th Cir. 1993). In *Cannon*, numerous pro-life demonstrators were arrested for carrying signs on a sidewalk in front of an abortion clinic reading, "The Killing Place". The Tenth Circuit Court of Appeals reversed the lower court and held that the right of the protestors to picket on the public sidewalk in front of the clinic was a "clearly established constitutional right." *Id.* at 874. The court further noted that signs reading, "The Killing Place", were not "fighting words" and were not likely to provoke a violent reaction. The court held that such expressive activity was clearly protected by the First Amendment and the protestors possessed a constitutional right to picket on public sidewalks without fear of arrest.

In contrast, the Florida Supreme court's decision prohibits peaceful pro-life demonstrations on a public sidewalk and public right-of-ways which have traditionally been held open for free exercise of expressive activities and association. In light of the Injunction's overbroad application in prohibiting pro-life activities within the sidewalk and right-of-ways surrounding the Clinic, the Florida Supreme court's decision to uphold the Injunction is in direct conflict with the Tenth Circuit's opinion in *Cannon*.

The Florida Supreme court's decision is in direct conflict with the Fourth, Fifth, Eighth and Tenth Circuit Courts of Appeals. A writ of certiorari should be granted to resolve these conflicts.

C. The Florida Supreme Court's Opinion Is In Direct Conflict With The Judgment Of Several State Courts.

The Florida Supreme court's decision to uphold an absolute ban on free speech within a traditional public forum is in direct conflict with other state courts. In *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue, et al.*, 406 Mass. 701, 550 N.E.2d 1361 (Mass. 1990), the Supreme Court of Massachusetts followed this Court's precedent set in *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886 (1982), noting: "When issuing an injunction, a judge must differentiate between legal and illegal expressive activity, and must carefully tailor the injunction to avoid unconstitutionally infringing on activity protected by the First Amendment." *Id.* at 1369. In *Planned Parenthood*, the court stated that an injunction can be issued to prevent illegal blocking of ingress or egress of the clinic property. However, the court further noted that other activities by the pro-life demonstrators were protected by the First Amendment. "Clearly, some of the defendants' activities at the protest, such as singing and chanting on public sidewalks, are protected, expressive activity." *Id.* In contrast with the Massachusetts court, the Florida Supreme court declined to follow this Court's ruling in *Claiborne Hardware*. Therefore, the Florida court's opinion is in direct conflict with the Supreme Court of Massachusetts.

The Florida Supreme court's decision is in direct conflict with *Parkmed Co. v. Pro-Life Counseling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982). In *Parkmed*, the Supreme Court, Appellate Division of New York, modified the injunctive order of the lower court which prohibited peaceful free expression in a quasi-public area. The court ruled that "the injunction, in precluding the defendant's 'from demonstrating, picketing and in any interfering . . . on the . . . plaza area and on its steps' was overly broad and unnecessarily restricted peaceful picketing and demonstrating in a quasi-public area." *Parkmed*, 91 A.D.2d at 552. Although the court recognized that reasonable time, place, and manner regulations can be applied to protect significant governmental interests, such regulations cannot regulate the content of speech and must leave open reasonable alternative means of communication. The court further held that: "A sufficiently clear standard must be set so that the parties are apprised of the type and degree of conduct restrained and a distinction is drawn between that conduct and lawful, peaceful demonstration so that the affected party is given a clear choice." *Id.*

In contrast with the New York court's reasoning in *Parkmed*,

the Florida Supreme court upheld an Injunction allowing a complete ban on lawful conduct and peaceful speech within a traditional public forum. In *Parkmed*, the New York court held that a complete ban of peaceful, nonviolent picketing and demonstrating in a public forum was unconstitutional. Therefore, the Florida Supreme Court's decision is in direct conflict with the New York court.

The Florida Supreme court's decision is in direct conflict with several state courts. A writ of certiorari should be granted to resolve these conflicts.

CONCLUSION

In light of the reasons stated above, the Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida.

Respectfully Submitted,

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December 3, 1993

APPENDICES

APPENDIX A

SUPREME COURT OF FLORIDA

No. 81,905

OPERATION RESCUE, OPERATION RESCUE AMERICA, OPERATION GOLIATH, ED MARTIN, BRUCE CADLE, SHIRLEY HOBBS, JUDY MADSEN, ET AL.,
Appellants,

v.

WOMEN'S HEALTH CENTER, INC., ET AL.,
Appellees.

Oct. 28, 1993.

Mathew D. Staver and Jeffery T. Kipi, Liberty Counsel, attorneys for Appellants Martin, Madsen, and Hobbs.
Talbot D'Alemberte and Susan A. England, attorneys for Appellees.

PER CURIAM.

We have for review a trial court order imposing an amended permanent injunction. The order has been certified by the district court as passing on an issue of great public importance requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const. We approve the order.

I. FACTS

Women's Health Center (Health Center) filed suit against Operation Rescue and others (Operation Rescue) seeking an injunction prohibiting that organization from engaging in certain activities against the Aware Woman Center for Choice (Clinic) in Melbourne, its patients, and staff. The court entered an order on October 25, 1991, granting a temporary injunction that imposed a number of restrictions.[1] Pursuant to the Health Center's request for permanent relief, the court directed the parties to submit a stipulation of issues and facts, which the parties did.[2] The court

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[1] The temporary injunction embraced the following restrictions:

1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner or by any means, are hereby enjoined and restrained from:

a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;

b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;

c) attempting or directing others to take any of the actions described in paragraphs a) and b);

2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate a), b) and c) above . . . .

[2] The parties' stipulation included the following:

2. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs are active in an organization known as "Operation Rescue America." In other

subsequently granted long-term relief, entering a permanent injunction nearly a year later, on September 30, 1992, based on a number of findings of fact[3] and imposing several general

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areas of the United States, this effort has been directed towards closing down abortion clinics throughout the country to save unborn children. Respondents desire is to close down "abortion mills" by various means. Operation Rescue America, Ed Martin, Judy Madsen and Shirley Hobbs well understand that peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties. They feel a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.

. . . .

6. Respondents have passed out flyers in the Central Florida area stating their desire to close down abortion clinics in this area. One of the flyers states that the demonstrations will be held in the Central Florida area.

7. Respondent Ed Martin has made statements that his desire is to close all abortion clinics in the Central Florida area. Ed Martin has stated to members of press that he would love to shut down all abortion clinics. Ed Martin has issued a press release which states that "the spirit of [massive anti-abortion demonstrations in] Wichita comes to Florida."

[3] The trial court made the following findings of fact:

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call "OPERATION RESCUE" (hereinafter, "OPERATION"), directed towards closing down abortion clinics and providers throughout the country. Respondents' own literature states that their intention is to "Physically close down abortion mills" by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

. . . .

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics.

6. Respondents have passed out flyers in the Central Florida area stating an

restrictions.[4]

Nearly six months later, after taking evidence and listening to extensive live testimony in a three-day evidentiary hearing, the trial court determined its prior restrictions had proved insufficient "to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services." Accordingly, the court on

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intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Martin have stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that "the spirit of Wichita comes to Florida." The press release also contained information that the Reverend Ed Martin of Ocala announces an "Operation Rescue" for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

[4] The permanent injunction contained the following general restrictions:

A. Respondents, OPERATION RESCUE . . . are hereby enjoined from:

1. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate [paragraphs] 1, 2, and 3 above . . . .

April 8, 1993, amended its prior order, concluding that Operation Rescue was engaging in actions that "impede and obstruct both staff and patients from entering the clinic" based on the following findings of fact:

A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred . . . . The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers . . . and occasional bullhorns . . . .

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

The court noted that in addition to activities outside the Clinic, Operation Rescue had implemented a "blockade" of the Clinic's telephone system, jamming its lines with multiple simultaneous calls and making it impossible for Clinic staff to summon emergency medical aid:

2. . . . [R]epeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

Further, Operation Rescue had approached the private residences of Clinic patients, employees, and staff, at times confronting employees' young children home alone while their parents worked:

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone," minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer" . . .

. . . .

1. That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

And finally, Operation Rescue had threatened violence against Clinic patients, employees, and staff:

F. . . . On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

. . . .

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

. . . .

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

The doctor who ultimately terminated his employment with the Clinic as the result of Operation Rescue's tactics testified at the evidentiary hearing concerning the adverse medical impact of those tactics on Clinic patients:

I. . . As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

Based on Operation Rescue's continued "interference with ingress to the [Clinic]," the trial court amended the general prohibitions of the permanent injunction to prohibit Operation Rescue from engaging in the following specific acts:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice . . .

(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The respondents must remain at least five (5) feet from

the Clinic's east line . . . .

(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents . . . .

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the streets on which those residences are located.

(7) At all times on ail days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.

(8) At all times on all days, from harassing, intimidating

or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines . . . .

Operation Rescue appealed the order granting the amended permanent injunction and the Fifth District Court of Appeal certified the trial court's order as passing on a matter of great public importance requiring immediate resolution by this Court.

II. LEGAL ISSUES

Operation Rescue challenges the propriety of only the amended permanent injunction, raising numerous issues under the United States Constitution: The amended injunction violates freedom of speech, freedom of association, equal protection, and the free exercise of religion.[5]

A. Standard of Review

In order for a permanent injunction to issue in a proceeding such as this, the petitioner must initially satisfy certain technical requirements:

> First, the plaintiff must demonstrate that the court's exercise of equity jurisdiction is proper. [In other words, the plaintiff must show that he or

[5] Although Operation Rescue notes in its brief that the right to free speech is also protected by the Florida Constitution, Operation Rescue makes no separate argument under the Florida charter.

> she has no adequate legal remedy; the threatened injury is real, not imagined; and no equitable defenses control.] Second, the plaintiff must actually succeed on the merits of [his or her] claims. Third, the plaintiff must show that the balance of equities tips in favor of injunctive relief.
>
> If an injunction should issue, the court has wide discretion in fashioning an appropriate remedy. But this discretion is constrained by precautionary considerations. The injunction that issues may not be drawn to enjoin all conceivable breaches of the law; it must instead be carefully tailored to remedy only the specific harms shown. It may be no broader than is necessary to restrain the unlawful conduct. The injunction, as drafted, should constitute "the least intrusive remedy that will still be effective."

Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1152-53 (E.D.Pa.1987) (citations omitted), *affirmed in part*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

Where an injunction is issued and challenged, Florida's appellate courts possess express authority to review the order. Fla. R.App. P. 9.130(a)(3)(B). The scope of review, however, is limited. As a general rule, trial court orders are clothed with a presumption of correctness and will remain undisturbed unless the petitioning party can show reversible error. *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979). To the extent it rests on factual matters, an order imposing a permanent injunction lies within the sound discretion of the trial court and will be affirmed absent a showing of abuse of discretion. See, e.g., *Bailey v. Christo*, 453 So. 2d 1134 (Fla. 1st DCA 1984), review denied, 461 So. 2d 113 (Fla. 1985). This is particularly true where the

order relies on live testimony or other evidence that the trial court is singularly well-suited to evaluate. Abuse of discretion, of course, is judged by the general "reasonableness" standard:

> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). To the extent it rests on purely legal matters, an order imposing an injunction is subject to full, or de novo, review on appeal. In the present case, Operation Rescue does not seriously question the technical validity of the amended injunction or the factual findings on which it is based. Our own review of the record shows that the order meets the "reasonableness" test for technical validity and that competent, substantial evidence supports the court's factual findings. Accordingly, we take as true the trial court's facts for purposes of evaluating Operation Rescue's constitutional claims.

B. Free Speech

Operation Rescue claims that the amended injunction violates the Free Speech Clause of the First Amendment of the United States Constitution because it completely bans religious speech in a traditional public forum, is not the least restrictive means of achieving the government interest, does not leave open ample alternative means of communication, and constitutes an impermissible prior restraint on free speech.

The present amended injunction undeniably operates at the core of the First Amendment because it regulates picketing and other activities on an issue of public concern and courts "have traditionally subjected [such] restrictions on public issue [expression] to careful scrutiny." *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Nonetheless, "[e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

1. Traditional public forum

To determine whether or to what extent limits may be placed on protected speech, the United States Supreme Court has generally focused on the place, or "forum," where the citizen seeks to speak. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The federal Court has identified three types of First Amendment fora, "the traditional public forum, the public forum created by government designation, and the nonpublic forum," and has tailored an analysis for each. *Cornelius*, 473 U.S. at 802.

The forum at issue in the present case consists of public streets, sidewalks, and rights-of-way, which--as the present parties agree--constitute a traditional public forum. See *Frisby*, 487 U.S. at 480. The relevant inquiry in such a case is multi-step and depends initially on whether the restriction is content-based or content-neutral:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit

expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry, 460 U.S. at 45 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

2. Content-neutral

Operation Rescue claims that the time, place, and manner restrictions at issue here are content-based and thus subject to the more stringent test noted above in Perry. We disagree. The restrictions regulate when, where, and how Operation Rescue may speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity.

> In fact, the injunction could apply equally to protests which supported abortion as well as to protests which opposed abortion, or indeed, to protests supporting or opposing any other cause.

> It is true that this injunction applies only to [these particular abortion opponents], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation.

Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 63 (3rd Cir. 1991). Because the restrictions are content-neutral, we proceed to decide whether they are "narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

3. Government interests

Operation Rescue claims that no significant government interest is implicated. We disagree. Numerous government interests, all of which rise to the level of "significant" or higher, are apparent. Our state has a strong interest in protecting the constitutional rights, both state and federal, express and implied, of all Florida's citizens, including its women. A woman's freedom to seek lawful medical or counseling services in connection with her pregnancy constitutes a clear personal right under both our state and federal constitutions. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re T.W.*, 551 So.2d 1186, 1193 (Fla. 1989). Our state also has strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens.

The United States Supreme Court delineated an additional government interest in *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), wherein the Court addressed the issue of picketers demonstrating outside the home of an abortion clinic doctor in violation of a city ordinance banning all residential picketing. The Court, in upholding the ordinance, noted that "the protection of residential privacy" constitutes "a significant government interest" and that "[o]ne important aspect of residential

privacy is protection of the unwilling listener." *Id.* at 484.

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85 (citations omitted) (quoting *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970)). We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy. Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy.

4. Narrowly tailored

Operation Rescue contends that the restrictions are not narrowly tailored, but rather operate as a complete ban on all religious and pro-life picketing outside the Clinic and homes of Clinic workers. We disagree. In sum, the amended injunction bans Operation Rescue from entering or blocking access to the Clinic, demonstrating within five feet of Clinic property on one side of the Clinic and thirty-six feet on the other three sides, making loud noises during surgery hours, approaching Clinic

patients within three hundred feet of Clinic property unless invited, demonstrating within three hundred feet of the homes of Clinic workers, or engaging in violent or threatening acts against Clinic workers or patients. The trial court found as a factual matter that each of these restrictions is necessary to counteract specific abuses Operation Rescue fomented after entry of the permanent injunction nearly six months earlier. As noted above, competent, substantial evidence supports all the trial court's factual findings, including its determination that Operation Rescue engaged in impermissible activities, and Operation Rescue does not now contend otherwise.

The type of focused picketing banned from the buffer zone around the Clinic and residences differs fundamentally from the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. Here, the picketing is directed at particular Clinic workers and patients, not the public at large. The United States Supreme Court has noted the difference between targeted and general picketing and described the invidious effect of this type of targeted picketing by those opposed to abortion:

> The type of picketers [i.e., abortion opponents outside a doctor's home] banned by the [restriction] generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt . . . .
>
> . . . .
>
> The First Amendment permits the government to prohibit offensive speech as intrusive when the

> "captive" audience cannot avoid the objectionable speech. The target of the focused picketing banned by the [restriction] is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home, is created by the medium of expression itself." Accordingly, the [restriction's] complete ban of that particular medium of expression is narrowly tailored.

Frisby, 487 U.S. at 486-88 (citations omitted). The above reasoning applies with even greater force where the object of targeted picketing is the medical patient seeking treatment, rather than the home-dweller. While targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of the hospital or clinic threatens not only the psychological but the physical well-being of the patient held "captive" by medical circumstance. This is amply demonstrated by the trial court's findings in the present case.

We note that while the trial court might perhaps have achieved its goal through use of a slightly narrower buffer zone around the Clinic and workers' residences, or perhaps by allowing a solitary picketer within the buffer zone as a symbolic gesture,[6] this Court will not sit as trier-of-fact and make incremental changes in the trial court's order, particularly where the restrictions were necessitated by clear abuse. In short, we "decline to entertain quibbling over a few feet" or over purely symbolic matters. *Portland Feminist Women's Health Center v. Advocates*

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[6] But see *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy.")

for Life, Inc., 859 P.2d 681, 686 (9th Cir. 1988). The amendments accordingly are sufficiently narrowly tailored to protect significant government interests.

5. Alternative means of communication

As its last point under the *Perry* standard, Operation Rescue claims that the restrictions do not leave open ample alternative means of communication. We point out, however, that Operation Rescue may at all times engage in expressive activity in the vicinity of the Clinic. In fact, Operation Rescue is entirely free to do the following at any time on any day: place an unrestricted number of picketers along the south edge of Dixie Way and both the east and west edge of U.S. 1; engage in singing, chanting, and whistling, as long as it cannot be heard inside the Clinic during the designated times; engage in "sidewalk counseling" of any Clinic patient who invites contact outside the five-foot and thirty-six-foot buffer zones; and picket in the neighborhoods of Clinic workers outside the three-hundred-foot buffer zone. Dixie Way is only twenty-one feet wide in the area of the Clinic and for all practical purposes Operation Rescue will be able to convey its message just as effectively from the south side of the road as the north. In fact, on the south side, its picketers will be in closer proximity to all eastbound traffic and will thus be better-positioned to deliver their message to those drivers and passengers. The only thing Operation Rescue will be unable to do from the south side that it could otherwise do from the north is block ingress to and egress from the Clinic. The amended injunction thus leaves open ample alternative means of communication for those who object to the Clinic's activities.

6. Prior restraint

As its last point under the Free Speech Clause, Operation Rescue claims that the injunction operates as an unconstitutional prior restraint on protected speech. The doctrine of prior restraint applies to content-based restrictions on speech prior to its

occurrence. See *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 550 N.E. 2d 1361 (Mass. 1990). As explained above, however, the present injunction is content-neutral.

C. Vagueness and Overbreadth

Operation Rescue claims that the following restrictions are both unconstitutionally vague and overbroad: the ban on "sounds or images observable to or within earshot of the patients inside the Clinic," the ban on "physically approaching any person seeking the services of the Clinic" within three hundred feet of the Clinic, and the ban on demonstrating within three hundred feet of workers' residences.

The United States Supreme Court has explained the doctrine of "vagueness":

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague

> statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (footnotes omitted). In sum, a government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

We conclude that the ban on "sounds or images observable to or within earshot of the patients inside the Clinic" is sufficiently specific to put Operation Rescue on notice that loud noises may not be made and signs depicting patients' names or other images may not be displayed from ladders above the Clinic fence in such a manner that they would be observable to patients within the Clinic during surgery and recovery periods. See *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 72 (3rd Cir. 1991) (injunction containing identical ban on "sounds or images observable to or within earshot of patients inside the Center" upheld). Similarly, the restrictions concerning "physically approaching" Clinic patients and demonstrating within three hundred feet of workers' homes are constitutionally sound. Each restriction was fashioned to combat a specific abuse and each provides reasonable notice that those particular abuses will no longer be tolerated. "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the [ban] are marked by "flexibility and reasonable breadth, rather than meticulous specificity," [and] we think it is clear what the [ban] as a whole prohibits." *Grayned*, 408 U.S. at 110 (citations and footnotes omitted). "We thus are unable to disagree with the [trial] court's conclusion that the terms of the

[ban] are not so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Medlin v. Palmer*, 874 F.2d 1085, 1091 (5th Cir. 1989).

As to overbreadth, the United States Supreme Court has noted that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the [ban] sweeps within its prohibitions what may not be punished under the First ... Amendment[ ]." 408 U.S. at 114-15. Operation Rescue claims that the above restrictions are overbroad in that they ban protected activities and reach individuals and groups not responsible for disruptive conduct. We have discussed the first concern already and have concluded that the amended injunction is narrowly tailored to achieve its purpose. As to the second, we note that the injunction tracks the language of Florida Rule of Civil Procedure 1.160(c), which provides that "[e]very injunction shall . . . be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." Given this limitation on the injunction's reach, we find no danger that the ban will be unfairly enforced against persons who have no notice or knowledge of the injunction's existence. See *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988).[7]

III. CONCLUSION

Richard Grayned was convicted for participating in a demonstration in 1969 outside West Senior High School in Rockford, Illinois, protesting the school's lack of African-American programs. The city ordinance under which he was convicted forbade any "noise or diversion which disturbs or tends to disturb the peace or good order of such school session or

[7] We find the remainder of Operation Rescue's constitutional claims to be without merit.

class thereof." *Grayned v. City of Rockford*, 408 U.S. 104, 107-08, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In a key case on First Amendment rights, the United States Supreme Court upheld the conviction and ordinance, with Justice Marshall writing for the Court:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (citation and footnote omitted). Justice Marshall went on to note that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id.* at 119. In other words, the First Amendment must yield when protected speech substantially interferes with the normal functioning of a public or private place.

This rule is particularly apt in the present case, where demonstrators' tactics have impaired the functioning not of a school but a licensed medical facility and have placed in jeopardy the health, safety, and rights of Florida women. Operation Rescue has formally stipulated that its program is "directed towards closing down abortion clinics." This philosophy and the organization's past tactics are clearly "incompatible with the normal activity of [this] particular place." *Grayned*, 408 U.S. at

116.[8]

We hold the restrictions contained in the amended permanent injunction constitutional in light of the medical services provided at the Clinic and Operation Rescue's past conduct. While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard--while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Our holding is consistent with the vast weight of both federal and state caselaw, wherein courts have upheld virtually all the present restrictions under similar circumstances.[9]

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[8] Operation Rescue's reliance on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L. Ed. 2d 1215 (1982), to support its Free Speech claims is misplaced. There, the United States Supreme Court ruled that the First Amendment bars Mississippi courts from imposing damages liability in favor of white merchants against individuals and civil rights organizations for lost earnings stemming from a black boycott of white businesses during the 1960's. Although state courts had originally granted injunctive relief to the merchants, the injunction issue became moot when the boycott was voluntarily lifted and was not addressed at all by the federal Court. The propriety of the injunction in the present case, on the other hand, is the sole issue before this Court--no party even claims that the Health Center is entitled to damages for Operation Rescue's actions.

[9] See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L. Ed. 2d 420 (1988) (ordinance imposing blanket ban on targeted residential picketing constitutional where abortion opponents had demonstrated outside doctor's home); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3rd Cir. 1991) (injunction containing language virtually identical to that in the present case held constitutional where read as creating 500 foot buffer zone around clinic and workers' homes); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989) (ordinance banning use of bullhorns and loudspeakers within 150 feet of medical clinic upheld against challenge by abortion opponents); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988)

Based on the foregoing, we approve the trial court's order imposing the amended permanent injunction. A full copy of the amended injunction is appended to this opinion.[10]

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING, AND IF FILED, DETERMINED.

(injunction limiting picketing outside abortion clinic upheld when read as banning noise that "substantially interferes with the provision of medical services within the Clinic, including counseling"); *Hirsh v. City of Atlanta*, 401 S.E.2d 530 (Ga.) (injunction limiting demonstrations outside abortion clinic upheld), cert. denied, 112 S.Ct. 75, 116 L. Ed. 2d 49 (1991); *Planned Parenthood v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990) (injunction limiting demonstrations outside abortion clinic upheld); *Bering v. Share*, 721 P.2d 918 (Wash. 1986) (injunction limiting demonstrations outside abortion clinic upheld), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L. Ed. 2d 990 (1987).

[10] We recognize that a panel of the United States Court of Appeals for the Eleventh Circuit has recently ruled that the federal district court erred in denying an abortion opponent's request for relief from the above injunction. See *Cheffer v. McGregor*, No. 93-2407 (11th Cir. Oct. 20, 1993).

APPENDIX B

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO.: 91-2811-CA-16-K

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR
CHOICE, INC., ET AL.,
Petitioners,

vs.

OPERATION RESCUE, OPERATION
RESCUE AMERICA, OPERATION
GOLIATH, ED MARTIN, BRUCE CADLE,
SHIRLEY HOBBS, JUDY MADSEN, ET AL.,
Respondents.

April 8, 1993

AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court for hearing on the motion of petitioners for sanctions and modification of the permanent injunction entered by this court, (The Honorable Wallace H. Hall), dated September 30, 1992, and the court having taken three days of testimony and having carefully considered the evidence and the legal arguments makes the following findings:

A. That despite the injunction of September 30, 1992,

there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath; some who were present in support of the clinic (pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as fifty officers on other days); and some representatives of the print and television media. The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the

exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone", minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer." The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer" - "We don't want you here in Melbourne." This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The

doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinics patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Conclusions

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-

way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the uninvited contacts, shadowing and stalking by the respondents and those acting in concert with them of the clinic staff and patients are impermissible conduct and should be restrained.

F. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the

following:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right--of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the

Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

(4) During the hours of 7:30.a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication,

otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic (unless permitted by "invited contact" as defined on page 10 of this order).

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way a notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Amended Permanent Injunction dated April 8, 1993, filed in Case No. 91-2811-CA-16-K, Circuit Court, 18th Judicial Circuit, Seminole County, FL. Copies of the Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Ave., Melbourne, FL; Sarno Complex, 1515 Sarno Road, Melbourne, FL; and Melbourne City Hall, 900 E. Strawbridge Ave., Melbourne, FL."

ORDERED AND ADJUDGED that, in order to provide for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in

order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines.

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable before the undersigned judge at his chambers, Room N327, Seminole County Courthouse, 301 N. Park Avenue, Sanford, FL at 8:30 a.m. on the seventh (7th) day after arrest exclusive of weekends and holidays. Any county or circuit judge in Brevard County is authorized to modify, upward or downward, the dollar amount and the return date of such bond upon good cause being shown. In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail and the undersigned judge shall be immediately notified by the arresting officer and Seminole County jailer of such confinement. Such arrested persons shall be brought before the undersigned judge not later than 8:30 a.m. of the day following his confinement in the Seminole County jail.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted

physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 8th day of April, 1993.

/s/ Robert B. McGregor
ROBERT B. MCGREGOR, Circuit Judge

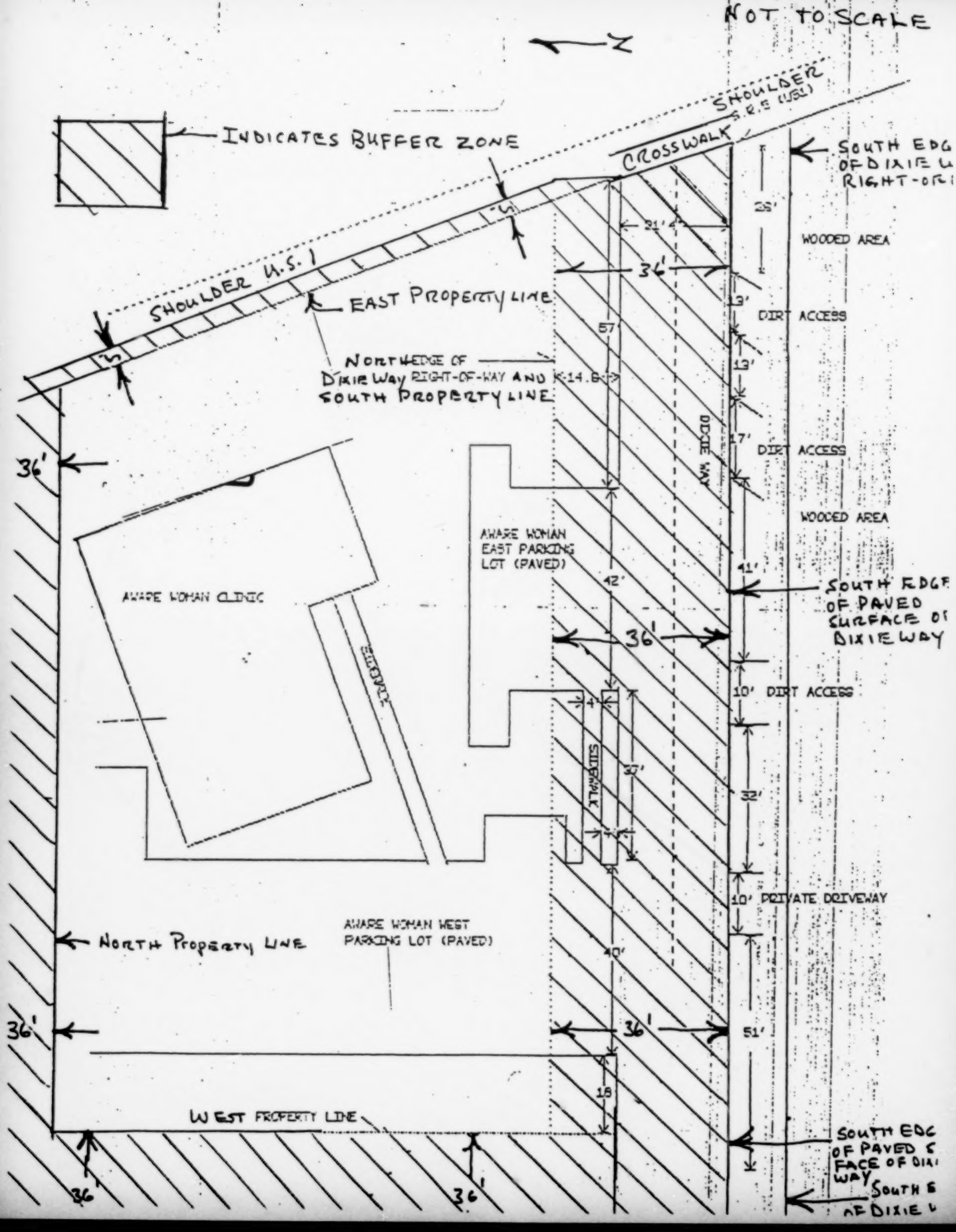
Copies furnished to:

Talbot D'Alemberte, 215 S. Monroe St., Suite 601, Tallahassee, FL 32301
Kathy Patrick, 1100 Louisiana, Suite 3400, Houston, TX 77002
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Christopher J. Weiss, Two S. Orange Ave., Orlando, FL 32802
Sheila Rae Eschenberg, 221 Avenida De Paz, Indiatlantic, FL 32903
Bruce Cadle, 701 Andrew St., N.E., Palm Bay, FL 32905
Patrick Mahoney, 1345 N.E. Fourth Court, Boca Raton, FL 33432 and at 613 Second Street, N.E., Washington, DC 20002
Randall Terry, RR2, Box 196, Harpursville, NY 13787-9536

by /s/ Doris D. Brady
Judicial Assistant

Date: April 8, 1993


NOT TO SCALE
INDICATES BUFFER ZONE
SHOULDER U.S. 1
CROSSWALK
SHOULDER U.S. 1
EAST PROPERTY LINE
NORTH EDGE OF DIXIE WAY RIGHT-OF-WAY AND SOUTH PROPERTY LINE
AWARE WOMAN CLINIC
AWARE WOMAN EAST PARKING LOT (PAVED)
AWARE WOMAN WEST PARKING LOT (PAVED)
SIDEWALK
DIXIE WAY
NORTH PROPERTY LINE
WEST PROPERTY LINE
SOUTH EDGE OF DIXIE WAY RIGHT-OF-WAY
WOODED AREA
DIRT ACCESS
WOODED AREA
SOUTH EDGE OF PAVED SURFACE OF DIXIE WAY
10' DIRT ACCESS
10' PRIVATE DRIVEWAY
SOUTH EDGE OF PAVED SURFACE OF DIXIE WAY
SOUTH EDGE OF DIXIE WAY
36'
57'
42'
40'
16'
35'
31'
13'
41'
51'

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2407

MYRNA CHEFFER,
Plaintiff-Appellant,

v.

ROBERT McGREGOR, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
(Hon. G. Kendall Sharp, *U.S. District Judge*)

Before

TJOFLAT, *Chief Judge*,
DUBINA, *Circuit Judge*,
PAINE[1], *Senior District Judge*.

October 20, 1993

Mathew D. Staver and Jeffery T. Kipi, Liberty Counsel, Attorneys for Plaintiff-Appellant.

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[1] Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

James L. Reinman, Gayle Smith Swedmark, and Gerald B. Curington, Attorneys for Defendants-Appellees.

TJOFLAT, *Chief Judge*:

Myrna Cheffer appeals from the district court's denial of her motion for a preliminary injunction preventing the enforcement of a state court injunction that regulates antiabortion speech at an abortion clinic. Because the district court mistook the legal significance of the state court injunction, and therefore erred in its application of the law to the merits of Cheffer's motion, we vacate and remand.

I.

Perhaps few Americans are content with the current legal status of abortion in America. Many see a woman's ability to choose abortion as a part of her fundamental constitutional right of self-determination that is ill-protected by the wavering jurisprudence of the Supreme Court. Many others see the 1.4 million abortions each year as an American Holocaust permitted by the moral vacillation of the government. This case arises out of the clash of these opposing beliefs, and governmental attempts to restrict their free expression. The Aware Woman Center for Choice is a corporation that operates an abortion clinic in a residential neighborhood in Melbourne, Florida. Operation Rescue is a major antiabortion organization known for picketing abortion clinics such as the Aware Woman Center. The Honorable Robert McGregor is a Florida Circuit Judge. Judge McGregor's docket includes the case *Aware Woman Center for Choice v. Operation Rescue*, No. 91-2811-CA-16-K, which concerns the conflict that arose when Operation Rescue and others began an aggressive campaign of picketing against the abortion clinic. On April 8,

1993, Judge McGregor issued an Amended Permanent Injunction[1] in which he enjoined certain activities of Operation Rescue and others in a court-drawn "buffer zone" surrounding the abortion clinic. The injunction, which was (to say the least) legislative in tone, was directed at Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by any means of this order. This group (collectively "Operation Rescue" or "the state court defendants") was enjoined (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida. (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic. (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic.... It is the intent of the court that the [defendants] may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way . . . . (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic. (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the

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[1] Circuit Judge Wallace H. Hall had entered a prior injunction on September 30, 1992. In the Amended Permanent Injunction, Judge McGregor found that the prior injunction had not prevented "interference with ingress to . . . the Aware Woman Clinic."

services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a nonthreatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them. (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. A map attached to the injunction indicated a "buffer zone" to be established around the boundaries of the clinic property. The buffer zone included a public sidewalk in front of the clinic as well as a public street and adjacent right-of-way.

On its face, the injunction appears to "criminalize" various acts of peaceful protest, including the mere penetration of the buffer zone by anyone acting "in concert" with those named in the injunction. It purports to provide the following enforcement mechanism: Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond . . . . In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail . . . . Such arrested persons shall be brought before the undersigned judge not later than 8:30 am of the day

following his confinement in the Seminole County jail.[2] The local police understood the injunction to require them to arrest "pro-life" individuals who violated the buffer zone. On April 11, 1993, approximately 50 apparently "pro-life" individuals were arrested for entering the buffer zone. Myrna Cheffer was not among them. Nevertheless, she filed this suit in federal district court seeking to enjoin enforcement of the state court injunction.[3]

Cheffer claimed that the injunction acted as a prior restraint on her free speech rights, and that the threat of arrest chilled her ability to exercise these rights. She sought a temporary restraining order as well as both preliminary and permanent injunctions to block the state court injunction. The district court denied the motions for a temporary restraining order and a preliminary injunction, finding that the balance of equities did not weigh in Cheffer's favor. The court deferred ruling on the motion for a permanent injunction. Cheffer now appeals.

We review a denial of an application for a preliminary injunction for abuse of discretion, adopting the district court's findings of fact unless clearly erroneous, but reviewing jurisdictional issues de novo. *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 627 (11th Cir. 1992). We consider the questions of standing and abstention in part II, then turn, in part III, to the merits of the case.

II.

An injunction is an extraordinary remedy that operates only

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[2] It is obvious to us that Judge McGregor did not intend the Amended Permanent Injunction to be enforced through the civil contempt process. See *Blalock v. United States*, 844 F.2d 1546, 1558-60 (11th Cir. 1988) (contrasting civil and criminal contempt). The injunction clearly attempts to circumvent a civil contempt process that the judge considered too cumbersome.

[3] An appeal of the injunction is currently before the Florida Supreme Court.

on the parties before the court. Legislation operates more broadly, extending to all actors within the legislature's territorial jurisdiction. Nevertheless, when Judge McGregor issued the Amended Permanent Injunction in the state case, he, in effect, created a criminal statute prohibiting "pro-life" free speech activity in a certain geographical location. Had he merely enjoined the defendants in the state suit from certain actions, Cheffer would have suffered no injury--she would be free to engage in peaceful speech activity on the sidewalk in front of the clinic. But by extending the injunction to nonparties and by attaching criminal penalties to activities otherwise protected by the Constitution, Judge McGregor crafted a law that seems to apply to Cheffer, who is neither a party nor an agent of any party.[4] It is this unusual characteristic of the injunction that seems to have misled the district court. We refuse to prefer form over substance; the injunction has all the attributes of a criminal statute and we will treat it accordingly.

A.

Although she was neither a party to the state suit nor one of those arrested for violating the buffer zone, Cheffer does not lack standing to bring this case. A plaintiff in federal court must satisfy the "case or controversy" requirement of Article III of the Constitution by showing that she has suffered an injury-in-fact that would be corrected by favorable decision in the lawsuit. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a

[4] Although we may be permitted our doubts as to the legitimacy of the injunction under Florida law (because, for one thing, it serves as a criminal sanction under the cloak of a civil injunction and thus may constitute an abuse of process), we assume, for the sake of argument, that Judge McGregor did not overstep his authority in crafting the order.

result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.* (citations omitted) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976)). Thus, a plaintiff who has not been prosecuted under a criminal statute does not normally have standing to challenge the statute's constitutionality. See *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971) (finding that plaintiffs who had neither been prosecuted nor specifically threatened with prosecution did not have standing).

Standing requirements to challenge speech restrictions, however, are less strict. "[I]n the First Amendment context, [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) (internal quotations omitted); see also *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S.Ct. 2839, 2846-47, 81 L.Ed.2d 786 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).[5] We conclude that Cheffer has standing to challenge the restrictions placed on her free speech by the Amended Permanent Injunction.

B.

Neither does the abstention doctrine block Cheffer's suit. The Supreme Court has directed that federal courts should not

[5] Under this rule of standing, it is unimportant that Cheffer has alleged that she intends to exercise her own rights to free speech.

intervene in ongoing state proceedings "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." See *Younger v. Harris*, 401 U.S. 37, 43-44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).[6]

As we have noted before, the initial inquiry in determining whether a federal court should abstain when asked to enjoin an ongoing state civil proceeding is whether an important governmental interest of the state is implicated by that civil action so that such an injunction would be an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding. *First Alabama Bank v. Parsons Steel, Inc.*, 825 F.2d 1475, 1483 (11th Cir. 1987) (internal quotations omitted), cert. denied, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 980 (1988). It appears that important state interests, including the enforceability of state court injunctions, are involved in the present case.

Younger abstention is only appropriate, however, when the federal constitutional claims at issue can be raised by the federal plaintiff in an ongoing state court proceeding. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986) (holding that Younger applies "so long as in the course of [the state] proceedings the federal

[6] *Younger* itself expressed a fundamental "public policy against federal interference with state criminal prosecutions," 401 U.S. at 43, 91 S.Ct. at 750, but later cases have extended this deference to some state civil actions. In general, "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 431, 102 S.Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982); see *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L. Ed. 2d 1 (1987). In particular, the Supreme Court extended the doctrine to cover the civil contempt process in *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L. Ed. 2d 376 (1977). The issue to be resolved is whether "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11, 107 S.Ct. at 1526.

plaintiff would have a full and fair opportunity to litigate his constitutional claim"); see also *Juidice*, 430 U.S. at 337, 97 S.Ct. at 1218. In the instant case, Cheffer has no remedy in state court except to subject herself to a criminal contempt citation (which she probably could not resist on the ground that the underlying injunction is unconstitutional, see *In re Novak*, 932 F.2d 1397, 1401-02 (11th Cir.1991)). The Younger abstention doctrine therefore is inapplicable[7] and the district court has jurisdiction to hear Cheffer's claim.[8]

III.

It is against this backdrop, then, that the district court must consider the four prerequisites to preliminary injunctive relief. Cheffer had "the burden of proving: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) [her] own injury outweighs the injury to [the clinic]; and (4) the injunction would not disserve the public interest." *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir.1990); *Lucero*, 954 F.2d at 627. The district court denied the motion for a preliminary injunction because it determined that Cheffer had not demonstrated that the balance of equities weighed in her favor. We conclude that the district court's misunderstanding of the legal significance of the injunction improperly colored its analysis. We must, therefore, vacate the order and remand the matter to the district court for further

[7] The defendants do not claim that the abstention doctrines require Cheffer to submit to arrest in order to be able to challenge the restriction in state court.

[8] Cheffer argues that the issuance of a preliminary injunction in the free speech context turns solely on whether the challenged action is unconstitutional. In other words, she suggests that "Once a violation of the First Amendment is established, preliminary injunctive relief is mandated." She relies, for this proposition, on *Gold Coast Publications, Inc. v. Corrigan*, 798 F.Supp. 1558 (S.D. Fla. 1992). While we agree that it is unlikely that an unconstitutional restriction would fail to warrant an injunction, we prefer that the district court follow the traditional analysis.

consideration of the plaintiff's motion for a preliminary injunction.

A.

The district court must first consider whether Cheffer demonstrated a substantial likelihood of success on the merits. When reduced to its essentials, Judge McGregor's Amended Permanent Injunction, by operating on persons not before the court, serves as a statute of local effect regulating picketing by antiabortion speakers. As a viewpoint-based restriction operating in a traditional public forum (the public streets and sidewalks around the clinic), it is subject to a most stringent review: In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). That the clinic is in a residential neighborhood does not remove the characterization of the adjoining streets and sidewalks as traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for

the use of the public.' " (citations omitted)).[9]

That the speech restrictions at issue here are viewpoint-based cannot seriously be doubted.[10] The order enjoins Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf . . . . Such a restriction is no more viewpoint-neutral than one restricting the speech of "the Republican Party, the state Republican Party, George Bush, Bob

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[9] In any case, the forum issue is not dispositive since the restriction is not viewpoint neutral. Even a nonpublic forum can only be regulated in a neutral fashion: Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985) (citations omitted). A restriction on "pro-life" speech would not even be permissible in the context of a nonpublic forum.

[10] We note that the Ninth Circuit reached a different result on similar facts in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988). There an injunction against "demonstrating or distributing literature ...; shouting, screaming, chanting, or yelling" by antiabortion organizations and those acting in concert was deemed to be content-neutral and thus a reasonable time, place, or manner restriction on speech. *Id.* at 684, 686. The court argued The preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates press, nor even to the general issues raised at their demonstrations. Rather, it focuses exclusively on the location and manner of expression. It protects the clinic from loudness and physical intimidation, not from content of speech. Therefore, we apply to the preliminary injunction the rules regarding the constitutionality of "time, place, and manner" regulations of speech. *Id.* at 686. We do not find this reasoning at all persuasive.

Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." The practical effect of this section of the injunction was to assure that while "pro-life" speakers would be arrested, "pro-choice" demonstrators would not.[11]

A viewpoint-specific restriction in a traditional public forum is unconstitutional unless (1) it is necessary to serve a compelling state interest and (2) it is narrowly drawn to achieve that end. See *Carey*, 447 U.S. at 461-62, 100 S.Ct. at 2290. The state court injunction does not seem to be either.

B.

The second inquiry concerns the threat of irreparable injury faced by the plaintiff. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); see *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

C.

The third inquiry is into the relative injury to Cheffer and to the clinic. The district court concluded that Cheffer did not carry her burden as to this point.

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[11] This is apparently precisely what occurred. Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the injunction) that they were designated for arrest by clinic workers and police officers because they were perceived to be "pro-life." Judge McGregor accepted this interpretation of the intent of the injunction and explained (to the arrestees): [T]he injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.

It is difficult indeed to weigh the relative value of different constitutional rights. Our sister circuit described a similar abortion protest case as a "clash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from *Roe v. Wade*." *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 791 (5th Cir.1989). We note, however, that in the instant case there is no indication in the record that women were actually prevented from obtaining abortions at the Aware Woman Center for Choice. The clash here is between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights.[12] Should the district court issue an injunction barring the state court from enforcing its injunction as a criminal statute, it would promote only speech and expressive conduct, not assault, trespass, or destruction of property.

D.

Finally, the district court must consider whether the issuance of the federal injunction would disserve the public interest. The importance of "the principle that debate on public issues should be uninhibited, robust, and wide-open" suggests that the issuance of the injunction would be no disservice at all.

It is tempting, of course, to entertain the argument that the speech in this case is disruptive, discourteous, and offensive, but that is irrelevant. The Supreme Court recently reminded us As

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[12] In the Amended Permanent Injunction the state circuit court recites a variety of inconveniences (e.g., "As vehicular traffic approached the [clinic] area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the [clinic], such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way."). (Emphasis added). Those apparently isolated incidents which were more intrusive (e.g. "stalking") are, for the most part, already tortious or criminal.

we have often had occasion to repeat, "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 882, 99 L.Ed.2d 41 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978)). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *United States v. Eichman*, 496 U.S. 310, 319, 110 S.Ct. 2404, 2410, 110 L.Ed.2d 287 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989)). *Simon & Schuster v. New York Crime Victims Bd.*, --- U.S. ----, ----, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). We protect much that offends in the name of free speech--we cannot refuse such protection to those who find abortion morally reprehensible.

IV.

The district court treated the state court injunction as an ordinary injunction when it had the effect of a criminal statute. Consequently, the order of the district court was founded on a mistake of law. We vacate the order, and remand for further consideration of the issuance of a preliminary injunction in light of this opinion.

IT IS SO ORDERED.

PAINE, District Judge, dissenting:

I would remand this case with instructions to the district court to enjoin enforcement of the state court's Amended Permanent Injunction against Myrna Cheffer ("Cheffer"), a person shown not to be acting in concert with the respondents in the state case.

The central facts of this matter concern the harassment of the function or undertakings of the Aware Woman Center for Choice, an abortion clinic. Prior restraint of the constitutional right of free speech by Cheffer is a concomitant issue adequately treated by the district court order. The strong remand suggested by the majority, bottomed on free speech, provides an imprecise emphasis.

The Amended Permanent Injunction details a factual background omitted by the majority opinion. On September 30, 1992, Judge Wallace H. Hall had entered an injunction against Respondents, three pro-life organizations and six individual pro-life activists, prohibiting interference with ingress to the Aware Woman Center. On April 8, 1993, following a three-day evidentiary hearing on Petitioners' motion to modify the injunction, Judge Robert McGregor found, in summary, that: A. Despite the previous injunction, persons continued to interfere with ingress to the clinic, by standing on the paved portions of Dixie Highway, standing, kneeling, and sitting on the unpaved portions of the road, approaching moving vehicles on the paved surface, and marching in a picket line that traversed the entrance driveways to the facility's two parking lots. Cars approaching the area were forced to slow down, particularly those wishing to enter the parking lots. B. Crowds of up to 400 people would gather at the clinic one to three times per week. The crowds included, not only the named Respondents, but other pro-life demonstrators, pro-choice demonstrators, up to 50 law enforcement officers engaging in crowd and traffic control, and media representatives. C. The gatherings would feature singing, chanting, whistling, music, and bullhorns. Pro-life and pro-choice groups would shout and yell at each other, often competing to make the most noise. D. The police were sometimes forced to erect barricades to separate the rival groups and permit traffic flow. The pro-life demonstrators would generally remain in the public right of way, while their pro-choice counterparts occupied private property on the clinic's lawn and parking lot. E. Vehicles slowing to enter the clinic's driveway would be approached by persons designated by

Respondents as "sidewalk counselors," who attempted to hand anti-abortion literature to the occupants and discourage their use of the clinic. F. The clinic has fences on its west and north sides. Persons would occasionally climb a ladder above the fences to shout at staff and patients entering the facility. On one occasion a demonstrator yelled to a clinic staffer, "I pray that God strikes you dead now!" G. Since the entry of the previous injunction, Respondent Bruce Cadle and others in concert with him have approached the private residences or temporary lodging places of clinic employees, to confront the occupants (including minor children), picket, shout at passers-by, contact neighbors, and hand out literature identifying the employee as a "baby killer." H. On one occasion, Cadle and others demonstrated outside a motel where a staff physician was staying. While Cadle remained outside, his cohorts entered the motel lobby, yelling "child murderer" and "baby killer." The disturbance delayed the doctor's departure for the clinic by one-half hour. I. The same physician was once delayed outside the clinic while Cadle and others stood in front of his car, screaming "baby killer--we don't want you here in Melbourne." This physician further witnessed demonstrators running alongside, and in front of, patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest therein. Patients experiencing this confrontation manifested a higher level of anxiety and hypertension, requiring a heavier sedation, and its associated medical risks, to undergo the surgical procedure. The noise of singing, chanting, and shouting also caused stress to patients during the surgery and recuperation. In addition, the doctor observed prospective patients turn away from the crowd in the clinic's driveway to return at a later date, which only increases the risk associated with the procedure. J. While driving home one evening, the same physician was followed by a person associated with Respondents, who pretended to shoot him from an adjoining vehicle. As a result of these activities, and the shooting of a physician in North Florida by an anti-abortionist, the physician terminated his employment with the clinic. K. Respondents or persons in concert with them recorded the license plate numbers of clinic patients, obtained their home addresses,

and contacted the patients. On occasion, multiple telephone calls have been placed to the clinic, jamming their telephone lines and making it impossible to summon an ambulance for a medical emergency. Patients and staff are sometimes followed in a stalking manner when they leave the clinic, causing them great apprehension. Judge McGregor thereupon entered the Amended Permanent Injunction against Respondents, Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, Shirley Hobbs, and all persons acting on behalf of or "in concert with" them,[1] the prohibitions of which are summarized by the majority.

This federal proceeding involves the constitutional challenge of Cheffer, a pro-life activist who claims that she is not working in concert with the named Respondents, wishes to engage in peaceful "sidewalk counseling" near the clinic, but fears arrest because (i) 50 similarly independent pro-life demonstrators were arrested on April 10, 1993, and (ii) Judge McGregor commented, during their initial appearances, that he considered any pro-life demonstrator to be acting in concert with the named Respondents for purposes of the Amended Permanent Injunction. On April 13, 1993, Cheffer filed a Verified Complaint for Declaratory Judgment and Preliminary and Permanent Injunctive Relief, Motion for Temporary Restraining Order, Motion for Preliminary Injunction and Permanent Injunction, with supporting affidavits and memoranda of law, seeking to prevent enforcement of the Amended Permanent Injunction against her. The next day, the district court denied the requests for a temporary restraining order

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[1] Florida Rule of Civil Procedure 1.610(c), like Federal Rule of Civil Procedure 65(d), provides that "[e]very injunction ... shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction." These procedural rules are derived from the common law doctrine that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L. Ed. 661 (1945).

and preliminary injunction "[b]ased on a review of the case file and the relevant law," without conducting an evidentiary hearing or permitting further briefing.

The majority concludes that "the district court mistook the legal significance of the state court injunction . . . ." Based upon a provision authorizing the arrest of willful violators, and the subsequent arrest of persons who claim no association to the state court litigation, the majority, in the name of "substance over form," but without citation of legal precedent, elects to treat the Amended Permanent Injunction as a criminal statute and remands the case so that the district court may do the same.[2] This Court has, however, previously affirmed an arrest, detention, and conviction pursuant to a civil injunction that expressly provided: "Anyone having notice of this order who violates any of the terms thereof shall be subject to arrest, prosecution and punishment by imprisonment or fine, or both, for criminal contempt . . . ." *United States v. Hall*, 472 F.2d 261, 263-64 (5th Cir. 1972) (emphasis added).[3] Furthermore, this Court has analyzed an injunction purportedly directed at "all persons who are residents of Colquitt County, Georgia" as "impermissibly broad," narrowed its application to the parties, then affirmed the injunction as modified. *Harrington v. Colquitt County Bd. of Educ.*, 449 F.2d 161 (5th Cir. 1971). The majority's unprecedented decision to assume an impossibility--that a state court judge has passed legislation--skews its analysis.

This improper analytical framework affects the threshold question whether Cheffer, as a supposed stranger to the litigation, has standing to attack the Amended Permanent Injunction.

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[2] In so doing, the majority manages to read Judge McGregor's mind, determining that he "considered [the civil contempt process] too cumbersome."

[3] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Because the majority has deemed the order an act of legislation, it invokes the substantial overbreadth doctrine, which permits First Amendment litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988); see also *Massachusetts v. Oakes*, --- U.S. ----, ---- - ----, 109 S.Ct. 2633, 2637-38, 105 L.Ed.2d 493 (1989). Under this analysis, Cheffer's own intention to speak is considered by the majority to be "unimportant."

The substantial overbreadth doctrine, however, has no application to injunctions, which bind only the parties and do not chill the conduct of others. *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 344 n. 16 (3rd Cir. 1992). A non-party ordinarily lacks standing to assert the free speech constitutional rights of parties subject to an injunction. *Radio & Television News Ass'n v. United States Dist. Court*, 781 F.2d 1443, 1448 (9th Cir. 1986); see generally *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80-81, 98 S.Ct. 2620, 2634-35, 57 L.Ed.2d 595 (1978) (discussing third-party standing). Cheffer's standing hinges entirely on her intention to speak and the "credible threat" of prosecution posed by Judge McGregor's statements regarding his interpretation of the injunction. *Kolender v. Lawson*, 461 U.S. 352, 355 n.3, 103 S.Ct. 1855, 1858 n.3, 75 L.Ed.2d 903 (1983); see also *Steffel v. Thompson*, 415 U.S. 452, 459-60, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974). Cheffer has proven a sufficient connection to the state court injunction to confer standing.

A review of *Younger v. Harris*, 401 U.S. 37, 41-43, 46, 91 S.Ct. 746, 749- 50, 751, 27 L.Ed.2d 669 (1971), and its progeny leads to the conclusion that abstention is inappropriate here, because Cheffer is not a party to the state case, nor are her interests "intertwined" with those of the parties. See *Hicks v.*

Miranda, 422 U.S. 332, 348-49, 95 S.Ct. 2281, 2291-92, 45 L.Ed.2d 223 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29, 95 S.Ct. 2561, 2566-67, 45 L.Ed.2d 648 (1975).

The majority opinion directs that the district court's order be vacated, remanding the case for application of the four-part test for preliminary injunctive relief.[4] But further proceedings below are unwarranted. Only different instructions to the district court are needed. When the Amended Permanent Injunction is properly viewed as an injunction, it becomes clear that the state court lacks the power to reach Cheffer. "[C]ourts . . . may not grant an injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945).[5] Given the "credible threat" of prosecution posed by Judge McGregor's comments, see *Kolender*, 461 U.S. at 355 n.3, 103 S.Ct. at 1858 n.3, Cheffer is entitled to an order prohibiting enforcement of the Amended

[4] The implication that the district court did not examine the request for preliminary injunction in light of (a) the likelihood of success on the merits, (b) irreparable injury, (c) relative injury to Cheffer and the clinic, and (d) whether issuance of the federal injunction would disserve the public interest is not supported by the record. The district court's order makes note of these requirements and concludes that the burden of proof was not met as to items (c) and (d).

[5] In *United States v. Hall*, 472 F.2d 261, 264-65 (5th Cir. 1972), this Court held that an injunction against obstructing school children's access to class could be applied to a non-party acting independently of the parties, because his conduct interfered with the plaintiff children's right to attend school and the defendant school board's duty to provide schooling. But this holding was clearly affected by the non-party's prior notice of the injunction and statement to police that he specifically intended to violate it. See 472 F.2d at 267 ("Rather than challenge [the injunction] by the orderly processes of law, he resorted to conscious, willful defiance."). Under the instant circumstances, Cheffer should be bound by the Amended Permanent Injunction only if she acted in concert with the named state litigants.

Permanent Injunction against her.[6]

[6] Nothing in this dissent, or the majority opinion for that matter, would prevent entry of a separate injunction against Cheffer if she harasses, intimidates, or otherwise abridges the rights of clinic patients or staff employees.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

OPERATION RESCUE, et al., Appellants,	)	
vs.	)	CASE NO. 81,905
WOMEN'S HEALTH CENTER, INC., et al., Appellees.	)	District Court of Appeal, Fifth District - No. 93-969

APPELLEES' EMERGENCY MOTION TO REQUIRE ENFORCEMENT OF INJUNCTIVE ORDER AND FOR SANCTIONS AND ALTERNATIVE EMERGENCY MOTION FOR ORDER ON MANDATE DIRECTING CITY TO ENFORCE VALID COURT ORDER

Pursuant to the Court's inherent authority and the Article V, Section 3(b)(7) power of the Court to issue "all writs necessary to the complete exercise of its jurisdiction," the Appellees seek an emergency order directed to the City of Melbourne, Florida and recite the following facts:

1. The City of Melbourne has not provided adequate protection to the Aware Woman Center for Choice, Inc. ("Clinic"), a lawful business providing licensed health care in the city and has failed to protect the rights of ingress and egress of the employees and patients of that health care facility.

2. This failure of the City to provide protection necessitated the legal action taken by the Clinic which resulted in a temporary injunction issued on October 25, 1991 and a

permanent injunction dated September 30, 1992. These injunctions protected the ingress and egress of the Clinic's personnel and patients.

3. The City's indifferent attitude toward the 1991 and 1992 injunctions and the rights of the Clinic, its employees and its patients allowed the groups which have sought to unlawfully interfere with the Clinic's business to continue to disrupt the operation of the Clinic. Indeed, as the record in this case and the findings of the trial judge demonstrate, the interference with the Clinic operation actually increased in early 1993.

4. The Clinic, faced with an escalating pattern of intimidation and harassment, and with continued blocking of ingress and egress, returned to Court once more and obtained yet another injunction on April 8, 1993. This injunction order (which was the subject of this appeal) was obtained on testimony which clearly demonstrated the continued pattern of disruption of the Clinic and activities which were inconsistent with public safety. One of the important witnesses called to testify was Capt. Allgeyer of the City of Melbourne's police department and he testified that it would aid the Melbourne Police to have a clear court order marking out the areas where demonstrators could exercise their free speech rights without interfering with the Clinic operation and the patients' travel to and from the Clinic.

5. This third injunctive order has now been affirmed by this Court in a decision dated October 28, 1993 and there can be no doubt that it is an effective and enforceable order.

6. The City of Melbourne is refusing to enforce the order.

7. The Clinic has contacted the City Attorney and sought the enforcement of the court order. In a letter to the City Attorney, the Clinic's counsel has pointed out that the Attorney General of Florida has given an opinion which states that the April 1993 injunctive order is to be enforced, that the press reports that

legal scholars and even opposing counsel in this case have stated their view that the order is in full force. (A copy of the letter and exhibits sent to the City Attorney are attached as Exhibit 1 to this motion.)

8. The Clinic is being subjected to new harassment contrary to a valid court order. The affidavits, attached as Exhibit 2 to this motion, state the facts of this continuing disruption in violation of the April 1993 order and the earlier 1991 and 1992 orders.

9. The Appellees are without any adequate remedy to secure the protection to which they are entitled by law and by the specific court orders.

10. The Appellees have had to go to additional expense to obtain enforcement of these orders, including consultation with the Attorney General, contacts with City officials and the filing of these papers. The Appellees have incurred costs solely because of the improper refusal of the City of Melbourne to enforce a court order.

Therefore, the Appellees seek the following relief:

1. The Court is requested to issue an emergency rule to show cause to the City of Melbourne to explain why it has not enforced a lawful injunction which has been affirmed by this Court;

2. Alternatively, the Court is requested to issue an emergency mandate to include directions to the City of Melbourne (and all other jurisdictions having police powers which are necessary to the enforcement of the injunctive order) to provide the protection for the Clinic, its personnel and its patients which has been ordered by the trial court and affirmed by this Court;

3. The Court is requested to order the City of Melbourne

to immediately take action to fully enforce the April 1993 injunctive order until there is a court order relieving the City from that burden;

4. The Court is requested to award attorney fees, costs and expenses to the Appellee as sanctions for the City's unreasonable refusal to follow a valid court order; and

5. The Court is requested to take such other action as may be necessary to fully protect the Clinic, its employees and patients and such action as is necessary in the interests of justice.

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 6th day of November, 1993, to the following:

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TALBOT D'ALEMBERTE

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

OPERATION RESCUE, et al., Appellants,	)	
vs.	)	CASE NO. 81,905
WOMEN'S HEALTH CENTER, INC., ET AL., Appellees.	)	District Court of Appeal, Fifth District No. 93-969

CITY OF MELBOURNE'S RESPONSE TO EMERGENCY MOTIONS

The City of Melbourne, Florida, [hereinafter "the City"] responds to the emergency motions filed by the Aware Woman Center for Choice, Inc. [hereinafter "the Clinic"], and states:

1. The City objects to any orders entered against it, particularly to orders imposing sanctions of attorney's fees and costs, because the City has never been a party to this action. (In fact, the City sought to intervene and to seek clarification of its duty regarding the McGregor injunction, and the Clinic opposed intervention by the City. The Circuit Court denied the City's Motion To Intervene and to Clarify Amended Permanent Injunction.)

It would be unjust to impose such severe sanctions against the City when the City has not had the opportunity to defend itself and has not had the opportunity to correct some of the inaccurate facts upon which the Clinic would have this Court impose

judgment.

2. The City specifically objects to the Clinic's allegations that the City has failed to provide the Clinic protection and that the City has had an indifferent attitude toward the injunctions. To the contrary, throughout the eight-year history of the controversy surrounding the Clinic, the City has consistently and even-handedly endeavored to keep the peace by balancing the rights of the Clinic and its patients with the constitutional dictates of the first amendment. Specifically, the City would show as follows:

A. The City has always been conscientious in enforcing applicable state laws at the Clinic site.

B. Contrary to the Clinic's unfounded allegations, the City has conscientiously enforced the terms of the injunctions and has arrested 144 people for violations of the injunctions.

C. The City's conscientious and consistent enforcement of the injunctions continued up until receipt of the opinion from the 11th Circuit Court of Appeals that cast serious doubt on the constitutionality of the McGregor injunction.

D. Although the City ceased to enforce the McGregor injunction upon receipt of the 11th Circuit opinion, the City continues vigorously to enforce applicable state laws at the Clinic site.

3. Unlike the present cause, in which the City has never been a party, the City is a party in *Cheffer v. McGregor*, No. 93-2407, 1993 U.S. App. LEXIS 27209 (11th Cir. Oct. 20, 1993). As this Court is aware, in that case a third party independently challenged the enforcement of the McGregor injunction. The 11th Circuit's opinion in an interlocutory appeal has cast serious doubt about the validity of the injunction. Particularly alarming were the 11th Circuit's observations during oral argument that enforcement

of the injunction could subject the law enforcement authorities to liability for false arrest.

Those observations, as well as the strong statements in the opinion itself, raise deep concerns about whether continued enforcement of the injunction would subject the City to potential liability for federal civil rights violations and to liability for warrantless arrests. Until this issue is finally resolved by the federal courts, the City has continued its vigorous enforcement of state laws, but has ceased enforcing the injunction to avoid exposure to liability.

4. A further concern is that the McGregor injunction merely authorizes the City to enforce the injunction and fails to order or to require enforcement. The City fears that the lack of a clear mandate in the injunction will subject the City to further liability if the City elects to enforce an injunction of questionable validity.

5. Throughout this controversy, the City has taken the position that it is inappropriate for the City to scrutinize the merits of, or to judge the lawfulness of, the McGregor injunction. This is in keeping with the principle that law enforcement authorities charged with the duty of executing court orders must not be called upon to answer for the legality of decisions which they are powerless to control. *See, e.g., Turney v. O'Toole*, 898 F.2d 1470 (10th Cir. 1990). Thus, the City committed itself to enforcing the injunction without question and without hesitation until directed to do otherwise by a court of law. It appears, however, that the llth Circuit's strong opinion doubting the lawfulness of the injunction likewise casts doubt as to whether the City would be immune from furthEr enforcement of an order that has been so seriously questioned. This Court should decline to force the City into such potential legal exposure until such time as the apparent conflict between the opinions of this Court and the llth Circuit has been resolved.

6. In addition, the Clinic's emergency motions are directed only to the City, although the McGregor injunction authorizes all law enforcement authorities to arrest those in violation of the injunction. It would be enormously unfair for this Court to grant the relief requested by the Clinic as to the City of Melbourne and to allow the other law enforcement authorities to escape both the legal liability and the other burdens imposed by an order of this Court. Indeed, the Clinic's harsh portrayal of the City in the emergency motions is particularly unjust in that no other law enforcement authority has ever even attempted to enforce the injunctions, and it is the City alone that has undertaken the task.

7. Finally, there is no authority for the imposition of the attorney's fees and costs sanctions requested by the Clinic against the City, who is an innocent non-party law enforcement agency, who throughout merely attempted in good faith to follow the law as it best understood it.

WHEREFORE, the City respectfully requests this Court to deny each and every request of the Clinic in its emergency motions.

Respectfully requested,
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Attorneys for Appellee

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I HEREBY CERTIFY that a true and correct copy of the foregoing City of Melbourne's Response to Emergency Motion has been furnished by U. S. Mail, postage prepaid, this 9th day of November, 1993, to the following:

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